Nos. 73 and 74.

Brf. of Hoehling for Appts.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 73.

THE YOUNG WOMEN'S CHRISTIAN HOME,
APPELLANT,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

No. 74.

BARBARA FAUL AND ANDREW WAESNER,
APPELLANTS,

vs.

JOHN L. FRENCH, ADMINISTRATOR OF EUGENE RHODES, DECEASED.

BRIEF ON BEHALF OF BARBARA FAUL AND ANDREW WAESNER, APPELLANTS.

A. A. HOEHLING, JR.,
Attorney for said Appellants.

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Brief on Behalf of Barbara Faul and Andrew Waesner, Appellants.

STATEMENT OF CASE.

The bill in this case was filed by the administrators *c. t. a.* of Sophia Rhodes, deceased, for the purpose of requiring Barbara Faul and Andrew Waesner, brother and sister of de-

cedent; John L. French, administrator of the estate of Eugene Rhodes, deceased, a son of decedent, and the Young Women's Christian Home, named as legatee in the will of decedent, to *interplead* among themselves and establish their respective claims to the fund held by the administrators of said Sophia Rhodes, deceased, amounting to the sum of $14,891.89 (*R., pp. 1–4; 20*).

The *facts* in the case are embraced in a Stipulation (*R. pp. 15–18*), are undisputed, and are substantially as follows:

1. Sophia Rhodes departed this life, under the circumstances hereinafter stated, leaving a last will and testament, dated May 10, 1894, which was thereafter duly admitted to probate and record in the Supreme Court of the District of Columbia, and which will, so far as applicable to this case, contained the following provisions:

"*Item 1.* I give, devise and bequeath unto my husband, Oliver Wheeler Rhodes, during his life one-half (½) of the income from all my properties and estate in the next following item of this last will and testament disposed of. * * *

"*Item 2.* I now give, devise and bequeath unto my beloved son, Eugene Rhodes, all my property, real, personal and mixed, of whatsoever nature, kind or description, * * * to be his absolutely, * * * subject only to the provisions of item 1 of this last will and testament.

"*Item 3.* In the event of the death of my son, Eugene Rhodes, before the decease either of myself or my husband, I then give, devise and bequeath all my property, everything I own on earth, as follows, viz:

"*1st.* I give, devise and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. * * *

"*2nd.* All the rest, residue and remainder of my property, real, personal and mixed, I give, devise and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest * * * and to pay over

the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my husband's, life, and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home of Washington, in the District of Columbia, to be the property of the said home absolutely.

"*Item 4.* In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise and bequeath all my property, real, personal and mixed, of whatsoever nature, kind or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution" (*R., pp. 19, 20.*)

2. The husband, Oliver Wheeler Rhodes, predeceased his wife and son, having died on January 27, 1895, thus eliminating from consideration herein such parts of said will as related to him.

3. The testatrix, Sophia Rhodes, and her son, Eugene Rhodes, sailed together from Bremen, Germany, on the steamer "Elbe," at three o'clock p. m. on Tuesday, January 29, 1895, having started on their return to this country in response to a cablegram announcing the death of the said Oliver Wheeler Rhodes. At about half past five o'clock on the morning following their sailing, and when about due west of The Hague, the steamer collided with another steamer, the "Craithie," going from Rotterdam to Scotland. The "Elbe" was sunk in said collision, and both mother and son perished in said disaster, along with many others, but few of the passengers being saved.

4. The only evidence tending to show the order of death of mother and son is found in the agreed statement of facts (*R., pp. 15–18*).

That evidence (aside from the relative ages, physical condition, ability to swim, etc., of said persons, which under all the authorities is here inadmissible as justifying any legal *presumption* as to the order of death as distinguished from actual *proof*) is found in the testimony of *two* of the survivors of said disaster—Anna Bocker and John Vevera (*R., pp. 16–18*).

Said Bocker testified that she saw testatrix come out of her cabin, clothed in a blanket over her night dress, as if to see what was the matter, and that witness never saw her again; that subsequently (certainly some minutes after), when witness went on deck, she saw Eugene Rhodes just in front of her, and never saw him afterwards (*R., pp. 16, 17*).

Said Vevera testified that *after* the accident, when every one was on deck, he saw said mother and son on the left side of the boat, and thus describes their position:

> "The mother had her arms thrown around the neck of her son in a grip that he thought she would never lose, and the son was endeavoring to put a shawl around her to protect her from the cold."

He then describes in detail his own efforts to fight his way through a crowd of sailors, who were keeping every one back; that he was cut on the wrist by an ax, but succeeded in getting by, and jumped over the side of the vessel, and was the last one to get into the lifeboat, being the nineteenth man, and that an unsuccessful effort was made to throw him out of the boat; that he saw Mrs. Rhodes and her son just prior to jumping over the side of the vessel, and that it would have been impossible for them to have gotten through the sailors, who were keeping everybody back.

He thus concludes his statement:

"He is positive that Mrs. Rhodes and her son remained together on the deck, as the boat in which he succeeded in escaping was the last one to leave the ship; that the scene made an impression on his mind that he will never forget; that after the boat in which he had gotten was some distance away, the ship went down with a lurch, and every one on board was drowned; that *both of these parties died together*; and, so far as this affiant was able to learn, after he saw these parties on the deck, clasped in an embrace that would never be loosened until after death, no one else saw them" (*R., pp. 17, 18*).

5. Six weeks thereafter, on March 6, 1895, the body of said son, Eugene, came up in a fishing net off the coast of Holland; the body of the mother was never recovered (*R., p. 16*).

6. The foregoing is the only evidence in the case throwing any light upon the conditions immediately surrounding the death of said persons, and the relative order of their deaths is unascertainable.

Three conflicting claims are urged in this case by the several parties in interpleader:

(*a.*) By Barbara Faul and Andrew Waesner, brother and sister and only next of kin of testatrix, that none of the contingencies named in said will, namely, that the son survived the mother, or that the mother survived the son, happened; and that, therefore, in contemplation of law, the estate must be disposed of as though the death of each had occurred at the same time, and that her estate descended to her next of kin, as in case of intestacy (*R., pp. 5–8*).

(*b.*) By John L. French, administrator of Eugene Rhodes, deceased, either that the son presumptively survived the mother; that the preponderance of evidence was in favor of the son's survivorship; or that the burden of proof lay on

the other defendants, to wit, legatee or next of kin of decedent, to establish that he did not so survive the mother; and that, if he survived her, he took her estate by act of the law, and not by virtue of the will, because the will gives the same estate as he would have taken in case of intestacy, and that title by law is considered to prevail, to the exclusion of title by act of the parties (*R., pp. 10–14*).

(*c.*) By the Young Women's Christian Home (hereinafter referred to as the Home), that the provisions of the will, taken as a whole, show a plain intention that, unless the son should survive the mother, so as to become the beneficiary and enter upon the substantial enjoyment of her estate, the same should pass to the Home, to the exclusion of all persons whomsoever (*R., pp. 9, 10*).

ASSIGNMENT OF ERRORS.

The appellants, Barbara Faul and Andrew Waesner, in said case No. 286 respectfully submit that the court below *erred*—

1. In holding that upon the death of testatrix the terms of her will raise "a *prima facie* right in the personal representatives of the son, and impose the burden upon her next of kin of displacing them by proof of his mother's survival" (*R., pp. 42, 43*).

2. In holding that "proof of that fact having failed, it follows that the representatives and next of kin of the son are entitled to the entire fund" (*R., p. 43*).

3. In refusing to hold that, in contemplation of law, the relative order of death of mother and son being unascertainable by proof, the property rights and estate of each must be administered and disposed of as if death had occurred to each at the same time.

4. In refusing to hold that, in contemplation of law, in the absence of proof as to survivorship, the estate of the mother descended to these appellants as her only heirs-at-law and next of kin, as in case of *intestacy*.

For *all* of which errors, as well others appearing in the record, it is submitted that the decree appealed from herein should be *reversed*, with directions to enter a decree awarding the entire fund here in controversy to these appellants.

ARGUMENT.

I.

IT IS NOT PERMISSIBLE UNDER THE GUISE OF CONSTRUCTION TO INCORPORATE DISTINCT PROVISIONS INTO A WILL, NOR TO INSERT THEREIN CONDITIONS OR CONTINGENCIES NOT PROVIDED FOR BY THE TESTATRIX.

As above noted, *three* conflicting claims are involved in this case.

In the *first* decision below (in the supreme court of the District of Columbia, holding a special hearing in equity), the learned justice, while conceding that, in the case of the death of two or more persons in a common disaster, there is no legal or artificial presumption of survivorship, and that the property rights of each such person must be disposed of, either by descent or will, as if such persons had died at the same time; nevertheless, held that the provisions of the will of testatrix, taken as a whole, show a plain intent that the Young Women's Christian Home should receive the estate of testatrix in the event her husband and son did not sur-

vive her, "*so as to have the use and benefit of the property*" (*R., p. 31*), and, accordingly, awarded the entire estate of testatrix, real, personal, and mixed, to the Home (*R., p. 31*).

On appeal, the Court of Appeals *reversed* said decree and held, in effect, that the bequest to the Home was one upon condition; that the condition did not happen; and that, therefore, said bequest did not take effect. It further held that no presumption of survivorship may be indulged in; but it declined to hold that the property rights of each such person must be disposed of as if death had occurred to all at the same time, and decreed that the burden of proof rested upon the next of kin of the testatrix to displace those claiming as next of kin of the son, and accordingly awarded said estate to the latter (*R., pp. 33, 43*).

It is from said last part of said decision and decree that these appellants have prosecuted this appeal. Inasmuch, however, as the Home has likewise appealed, it is proper to consider, at the outset, that part of the holding of the court below which these appellants insist is correct.

The attention of the court is, therefore, first asked to the following considerations, which, it is submitted, conclusively establish that the claim of the Home to the estate here in controversy cannot be successfully maintained:

(*a.*)

Rules Governing Construction of Wills.

It will be noted that there is absolutely no ambiguity nor uncertainty in the terms and provisions of the will here under consideration. The testatrix, by apt and clear terms, expressly directed the conditions and contingencies upon which, and the persons to whom, her estate should pass.

The will, in substance, provided that, subject to certain provisions for the husband, her estate should go to her son, Eugene Rhodes, absolutely; but, in the event of the predecease of her son, then, subject to a life estate in the husband, her estate in remainder should go to the Home, absolutely; and, further, in the event testatrix became the survivor of both husband and son, her entire estate should go to the said Home, absolutely.

The result, therefore, of the provisions of said will is this: The devise to the son was on the express condition that he survived the mother; and the devise to the Home was on the express condition that she became the survivor of both husband and son, each of said devises being upon the express condition of *survivorship*.

In the *first* decision below the learned justice came to the conclusion that the possibility of death occurring to mother and son at the same moment was so remote that testatrix had never thought of that contingency, or of any consequence to follow it, but that what she evidently meant by her will, taken as a whole, was this:

> "That if her husband and son did not survive her *so as to have the use and benefit of the property*, and the same remained under her control at the time of her death, when the will speaks, then it should go absolutely to the charity she had named" (*R., p. 31*).

In other words, while said court was compelled to find that *none* of the conditions or contingencies named by the testatrix had in fact happened, yet, at the same time, it assumed that, in all probability, had it occurred to testatrix, she would have said, "If it cannot be ascertained whether my son survives me or whether I survive him, then also the

Home shall take;" and, having thus determined what the testatrix in all probability would have done, had she thought of it, said court proceeded to incorporate such condition and contingency into the will, and to give effect to its terms and provisions as so thereby enlarged.

Such action would, if permitted, necessarily result in the *making* of a will by the court instead of *construing* the one actually made by the testatrix.

The claim of the Home in this case is not based upon the contention that any of the contingencies expressed in the will have happened or can be shown to have happened, but that it was the plain intention of testatrix that the Home should become the beneficiary of the entire estate in the event of the death of all the parties, so that husband and son could not enjoy the use and benefit of the property; and accordingly the Home insists that it is the duty of the court to give effect to such supposed intention of the testatrix by the insertion of a provision to cover such contingency, notwithstanding the unambiguous, explicit, and express terms used by her.

It may be useful to here refer to a few well-recognized principles applicable to the *construction* of wills.

Redfield, in his work on Wills (*vol. 1, 4th ed., par. 33-1, p. 458*), has thus clearly stated the rules followed by courts, as well as the extent to which courts may go, in the matter of *construing* wills:

"It is an established rule in the construction of wills, that where it is evident the testator has not expressed himself as he intended, and supposed he had done, and the defect is produced by the omission of some word or words; and where it is certain, beyond reasonable doubt, what particular words were thus omitted, they may be supplied by intendment,

and the will read, and construed, as if those words had been written in the place, or places, where they were intended to have been."

This applies to a case where testator has not expressed himself as he intended or as he supposed he had, because of the omission of some word or words. What he says and what he intended to say must both be manifest, and if the words used do not express what he manifestly intended, the manifest intention will prevail. If a sentence be incomplete, but the intention of the testator is apparent, the sentence will be completed; but to authorize the supplying of omitted words, it must be certain, beyond reasonable doubt, that the testator intended to use such words, and by some mistake omitted them thinking he had used them.

But nothing of the kind occurred in the present will: it is not contended that testatrix used any words she did not intend to use, or that she omitted, in any sentence or provision, words that she intended to use. The words used are the words manifestly intended; the meaning is clear; it is not a case of ambiguity, and it is not a case for construction. There is no mistake in the will, nor is there any sentence of uncertain meaning.

Hence, to here supply a provision to cover a totally distinct contingency, would not be the correcting of a mistake; nor would it be the supplying of a word or words omitted. This is clear beyond dispute.

The author continues:

"But no word can be thus supplied, so long as there is any fair ground to question *what particular words were intended to have been used, which were not*" (*par. 33–2, p. 459*).

This refers evidently to the supplying of an *omitted* word which the testatrix intended to use and thought she had used. But even such a word cannot be supplied if there is any ground to question whether she intended to use that word and by mistake omitted it.

Then follows this sentence:

"And by this is meant, that, so long as different persons may be supposed to entertain different opinions, in regard to the particular *words intended to have been used*, or, at least, as to the *import of these words the will must be read as it appears*, and the meaning extracted as it best can be, from what is written."

In all this there is nothing to authorize the court to supply in a will a provision not attempted to have been written in it by the testator or to provide for a contingency for which the testator did not attempt to provide.

Again, it is stated:

"*The result of all the cases, in regard to supplying words, seems to be, that it cannot be done, unless it is clear there has been an omission, and also clear what that precise omission was.* In other words, that you cannot, by mere construction, incorporate distinct provisions into the will, however certain it may be that they were omitted by mistake" (*par. 33–15, p. 468*).

The author continues:

"In order to reach the obvious general intent of the testator, implications may supply verbal omissions, and all inaccuracies of grammar, or impropriety in the use of terms, may be corrected, if the general purport of the instrument be clear and manifest. And words may be supplied, where the sense of the clause, as collected from the context, plainly requires it. So words may be supplied, and the grammatical construction disregarded, in order to conform to the clear intent of the testator, as indicated by the whole will" (*par. 33–17, p. 469*).

This again refers to the power to supply omissions, correct inaccuracies of grammar, improper use of words, etc.

"But, as we have said at the beginning, courts will supply only such words as it is clear it was the intention of the testator to use, *and not such as appear to be requisite to carry into effect the probable intention of the testator*" (*par. 33–19, p. 470*).

Aside from the foregoing, it is proper to here add that the devise to the Home cannot be given effect by *transposing* the words used by testatrix. In item 4 of the will it is provided:

"In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes,"

the property is to go to the Home.

The contention of the Home, if followed, would result in changing said provision of the will last referred to, so that it shall read:

"If it cannot be ascertained whether my son survives me or whether I survive him,"

then also the entire estate to vest in the Home.

Such change, however, is not permissible and is not mere transposition.

In Redfield on Wills (vol. 1)—subject, "Transposition of words"—the author states:

"Where a clause in a will is insensible, or absurd, and can be rendered sensible, and consistent with the general tenor of the will, and with the extraneous circumstances, by transposition, it is generally allowable. *But words in a will, that are good sense, are not to be transposed.* And in no case, we apprehend, is a transposition of words allowable in a will,

where it apparently changes the intention of the testator, as indicated by the natural import of the words, as arranged in the will, and there is nothing to show that such was not the intent; *but only where the meaning is obscure, upon the face of the instrument, and is rendered clearer or more obvious, by such transposition*" (*par. 34–1, p. 471*).

Now, the words of testatrix, as used in this will, are good sense; therefore not to be transposed. The meaning is not obscure upon the face of the instrument, but is perfectly clear, *and but for the happening of the contingency not provided for in the will*, viz., the death of mother and son at the same time, *no question could arise as to their meaning*, nor could there be the slightest reason for any transposition whatever. If the meaning is clear and sensible, *the happening of a contingency not contemplated by testatrix cannot affect the meaning.*

Again, the author states:

"But in the construction of a will, it is not sufficient to avoid the will for uncertainty, if plainly expressed, that the dispositions are so absurd and irrational, that it is difficult to believe they could have been the real intention of the testator. To pronounce that result, they must be so uncertain as to be incapable of any clear meaning. *Where the dispositions of a will are clearly expressed, it matters not how irrational or inconsistent with the general purposes of the will they may be*, they must prevail, if there be no other objection" (*par. 34–3, p. 472*).

This would seem to be conclusive against any attempt to transpose the clear and well-chosen words of the will in order to make the will consistent with any supposed "general purposes."

In said first decision below the court did not transpose the words, but undertook to read into the will a contingency it did not contain, and one for which the testatrix had made no attempt to provide, and this is made perfectly apparent in

the opinion rendered in connection with said first decision, where the court stated:

"The possibility of death occurring to all three, or to any two, of them at the same moment was so remote that *she never thought of that contingency, or any consequence to follow it.* She had only three persons in mind as the objects of her bounty—her husband, her son and said Home, and she supposed she had covered every contingency by the *careful wording used*" (*R., p. 30*).

That is, the court proceeded to supply a provision to cover a contingency that might arise, but one that testatrix "never thought of;" * * * "she supposed she had covered every contingency by the careful wording used;" that, having contemplated and provided for two alternatives, she did not provide for a third which she admittedly did not think of; and the court then propounded the following question, and answered it in the affirmative:

"Are the established rules of construction broad enough to enable the court to properly and legally read the paper as if she had supplied the other alternative?" (*R., p. 30–1.*)

It is clear that the words so attempted to be read into the will are not a construction of the words found in the will, either by transposing them so as to make their meaning clearer, or by supplying words which testatrix intended and attempted to use, but did not use; or by saying something which she by the language she did use intended to say, but did not say clearly or correctly; on the contrary, as the court itself admitted, they are words intended to provide for a contingency which testatrix "*never thought of;*" and this is made clear beyond question where the court adds:

"If the words of the fourth item are read by themselves and given their literal meaning, *it must be held that the con-*

tingency therein named has not been shown to have happened; and, therefore, her bequest to the Home would fail" (*R., p. 30*).

So much for the rules governing the *construction* of wills.

(*b.*)

Courts may not, by construction, provide for unforeseen events.

The bequest to the Home was plainly one upon condition, to wit, *survivorship* on the part of testatrix. The burden of establishing the happening of that condition is upon the legatee claiming under such provision. That fact in this case is incapable of proof and is otherwise judicially unascertainable, and hence the bequest to the Home must fail. The court is not permitted to provide for the unforeseen event which actually happened in this case.

The authorities clearly establish this proposition.

For example, in Roper on Legacies (*vol. 1, p. 750*) the author states:

"A conditional bequest is where its taking effect or continuing in operation depends upon the happening or not happening of some uncertain event" (*2 Redfield on Wills, 283*).

And, again, the same author proceeds:

"Where the testator in the disposition of his property overlooks a particular event which, had it occurred to him, he would in all probability have provided against, the court will not rectify the omission by implying or inserting the necessary clause, *conceiving it to be too much like making a will for the testator rather than construing that already made*" (*2 id., 1464*).

To the proposition last quoted, the author cites a number of cases, which may properly be referred to in this connection.

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No case has been cited by counsel for the Home which, in any way, supports its contention.

This very question, however, was involved and decided in the leading case of Wing *vs.* Underwood (4 *De G. M. & G., 633, 654*), where, after careful consideration, decision was rendered against the construction contended for by the Home. There a bequest was contained in a will in favor of one Wing, dependent upon the condition: "And in case my wife shall die in my lifetime, then," etc. Husband and wife perished in the same shipwreck, and there was no proof of survivorship.

Lord Chancellor Cranworth, in deciding this question, stated:

"The gift to Mr. Wing is in terms made dependent, and was evidently meant to be dependent, on the single event, setting aside the children, of the testator surviving his wife: If she should survive, he gives everything to her: if she dies in his lifetime he gives everthing to Mr. Wing: it is impossible to say that there is any third case, or class of cases, to which the language of the will could possibly be applicable. It may be that, if the extremely improbable event which did occur had presented itself to the testator's mind as a possible contingency, he would have wished Mr. Wing to take his property: but then he would have done this, not by relying on the words now found in the will as being sufficient for the purpose, but by making express provision to accomplish his object.

"It is not sufficient to say that, if for any reason the gift to the wife fails to have practical operation, the testator must have intended to benefit Mr. Wing: the answer is, he has not said so, neither expressly or impliedly; and if I were to attempt to supply the omission I feel that I should be making, not construing, the testator's will."

The same question was later considered in the House of Lords, in a case arising under the will of Mrs. Underwood, which gave her property to Wing, also, in case her husband

died in her lifetime, and the same decision was followed (Wing *vs.* Angrave, *8 H. L., 205*).

The facts in that case are thus stated in the report:

"Two persons, husband and wife, made their separate wills. In the husband's will, the property was given to his wife, 'and in case my wife shall die in my lifetime,' then to W. W., in trust, for the children on their coming of age, and in case all of them should die under age, then to W. W. for his absolute use and benefit. In the wife's will (made under a power given her by her deceased father, in default of the exercise of which the property was given to relatives specifically named), the property was given to the husband (subject to interest in the children), and 'in case my husband should die in my lifetime,' then to said W. W. absolutely. The husband, wife and their children perished at sea, being all swept off the deck by one wave, and all disappeared together."

It was urged by counsel on behalf of Wing that the estate should be held to have vested in him, and the union of the characters of legatee under the husband's will and appointee under the wife's will was especially urged upon the court in support of the claim of Wing—a situation of affairs very similar to the case at bar in respect of the claim of the Home. The court, however, refused to give such effect to the devise, stating:

"There is not, so far as I am aware, either principle or authority for saying that if there is a bequest to A, on a particular event, and failing that particular event, to B, that B can take if it cannot be ascertained whether the event has or has not happened. In such a state of circumstances, there is no more right in B than in A. The husband here, by his will, said, that if his wife died in his lifetime, Wing should take. *In all probability he would also, if it had occurred to him, have said, 'If it cannot be ascertained whether she dies in my lifetime or not, then also Wing shall take;' but that he has not said.*

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"On this ground I decided against Wing in Underwood *vs.* Wing. It was uncertain in that case whether Mrs. Underwood did or did not die in her husband's lifetime. * * * Mr. Underwood's next of kin were of course *prima facie* entitled to his personal estate, and as Wing could not displace this title by showing that Mrs. Underwood died in his lifetime, I held with the master of the rolls, that there was nothing to displace the *prima facie* title of the next of kin represented by the plaintiff in that suit."

The rules of decision so laid down in the cases of Wing *vs.* Underwood, and Wing *vs.* Angrave, *supra*, have never been overruled; but, on the contrary, have ever since been followed, both in England and this country.

The following additional cases are directly in point:

In Illinois Land and Loan Company *vs.* Bonner (*75 Ill., 317*) the syllabus states:

"Courts cannot provide for unforeseen contingencies. When the testator in the disposition of his property overlooks a particular event, which, had it occurred to him, he would in all probability have provided against, *the court will not rectify the omission by implying or inserting the necessary clause.*

"A contingency to divest an estate must happen literally. When a prior estate is vested by a devise, but subject to be divested upon the happening of a contingency, the contingency must take place literally or the prior estate will not be divested."

(The above language, as will be seen, is quoted directly from *2 Roper on Legacies, 1464, supra.*)

In its opinion, the court adds:

"The testatrix did not in her will provide for the events that have happened, that is of her sister dying over eighteen and the brother under twenty-one. *In such case, a court will not provide for the unforeseen events*" (*p. 347*).

In the case of Gibson *vs.* Seymour *et al.* (*102 Indiana, 485*) the testatrix devised all of her property to her husband for life, and further provided, "If my husband survive me I desire at his death that all I may own or be possessed of shall go to and become the property of my well-beloved step-daughter," naming her. These were the only dispositions she made of her property, and the husband died before the testatrix. It was held that testatrix died intestate as to the property in question, the court in its opinion stating:

"This language is plain; its meaning is obvious. We are not at liberty to qualify or control such language in a will by conjecture or doubt arising from extraneous circumstances.

"The devise of the real estate in question to the appellant is contingent in form, and no transposition of the language of the will, which does not modify the meaning, can be made so as to render the devise other than a contingent one.

"*We may conjecture that the testatrix failed through inadvertence to express her intention as she would have done if her attention had been called by another person to the matter about which the parties to this suit are now through it contending. But courts can no more make a portion of a will than they can make an entire will.*

"We cannot say that the testatrix by her will gives the real estate in question to the appellant in fee-simple merely subject to the life estate previously given to the husband of the testatrix. She plainly made the devise of this real estate to the appellant contingent upon an event which did not happen.

"She made no expression of intention in regard to this property in the event that she should survive her husband; and there is nothing left for us but to conclude, with the court below, that as to this property she died *intestate*."

In that case, a petition was filed for a rehearing; and, in passing upon the said petition, the court delivered a careful opinion, in which it analyzed the proposition of law

last cited in the light of the text books and leading cases, and concluded by affirming the judgment previously given. The opinion will be found to contain a careful statement of the law and decided cases, and reference to it may be usefully made.

The case of Rupp *vs.* Eberly (*79 Penn. St., 141*) is frequently referred to in decisions bearing upon this question. In that case the court held that courts are not permitted to give effect to the will of the testator contrary to the plain and obvious import of the terms used by him upon a mere conjecture, and that nothing is more definitely settled than the principle that devises limited in clear and express terms of contingency do not take effect unless the events upon which they are made dependent happen.

The foregoing authorities establish that the present will cannot be so enlarged and extended, by *construction*, as to confer upon the Home title to the fund in controversy.

II.

THE WILL OF THE TESTATRIX DOES NOT SHOW AN INTENT THAT THE HOME SHOULD RECEIVE HER ENTIRE ESTATE, SAVE ONLY IN THE EVENT OF THE SUBSTANTIAL SURVIVORSHIP OF THE SON.

No more dangerous doctrine could be asserted than one which would permit the changing of testamentary dispositions to meet unforeseen conditions and contingencies, so as to make the same conform to what a particular tribunal may suppose the testatrix would have wished had she had in mind, at the time of making her will, the situation that subsequently arose, and this case well illustrates the utter impro-

priety of taking any such liberties with solemn testamentary acts.

Here the Home gravely asserts that the testatrix meant that it should be the *sole* object of her bounty and the recipient of her entire estate, "to the exclusion of all other persons whomsoever" (*R., p. 9*), in every contingency save one, namely, that the son should survive the mother, "so that he might * * * enter upon and enjoy her estate" (*R., p. 9*).

And the argument is carried to the extent of insisting that a mere *temporary* survivorship by the son, or one of *inconsiderable* duration, would not suffice, in the eyes of the law, to defeat the bequest to the Home, but that, in order to accomplish such result, the son must have survived the mother "so that he might * * * enter upon and enjoy her estate."

To accept such contention as sound would be to attach to the word "survivorship" a qualification and limitation not as yet recognized in any reported case.

The fallacy of any such contention was referred to and disposed of in the case of Wing *vs.* Angrave, *supra* (8 H. L., 205), where, in the opinion, referring to the prior decision in Underwood *vs.* Wing, Lord Cranworth stated:

"It was, as I thought, a fallacy to assume that the bequest to Mrs. Underwood had failed to take effect. Undoubtedly it had failed so to take effect as to give her any practical enjoyment of the property, for, if she was the survivor, she could not have survived for more than a few seconds, but her survivorship, if she survived but for a second, was sufficient to displace the claim of Wing, and to entitle her personal representatives to the whole personal estate of her husband. The inability to ascertain the truth no more assisted the claim of Mr. Wing than that of Mrs. Underwood's personal representatives."

As showing how utterly untenable the claim of the Home really is, and how dangerous it would be if courts were permitted to speculate upon *supposed* testamentary intentions, not expressed in words, consider for a moment the *facts:* The son was 23 years of age and unmarried. The greatest affection existed between mother and son. In the ordinary course of events it was not unlikely that he would marry and have issue. Can it be supposed that the testatrix really intended to so dispose of her entire estate to a corporation to which she owed no obligation, to the *exclusion* of the issue of her son, in the event he had such issue but predeceased her? This is another *omission* in her will which she evidently overlooked.

The argument of the Home would lead logically to this very result.

The court below commented on this very phase of the case, and clearly summed up the situation, as follows:

"Another omission of this will tends to illustrate the impropriety of giving it a construction founded upon what has been aptly called, the testatrix's 'intention' in the loose sense of that word. No provision is made for the contingency of Eugene Rhodes' death leaving issue. Consequently, upon the construction contended for, if he had married and left a child surviving him, that child would be cut out. This contingency, far more likely of apprehension than the one that did happen, was no more present in the mind of the testatrix than was the other. And there is nothing in the will or the circumstances surrounding the parties that would justify any other conception than that had it occurred to her she would have provided for it by apt words for the purpose," (*R., pp. 39, 40*).

The mere statement of any such contention is to refute it.

III.

THE AUTHORITIES CITED IN SUPPORT OF THE CONTENTION OF THE HOME ARE NOT IN POINT.

Before concluding this branch of the case, it may be proper to refer to the cases relied upon by the Home, and cited in the opinion rendered in connection with the *first* decision herein; none of which, however, it is submitted, in any way, support the contention, nor do any of them sanction the changing of a will as is sought to be done in this case.

Those cases are, in brief, as follows:

Finley *et al. vs.* King's Lessee (*3 Peters, 346*): The question here presented was whether a condition expressed in a will was precedent or subsequent, and in deciding the case the court stated what need not be here controverted, namely, that "the intent of the testator is the cardinal rule in the construction of wills." The court construed said will and determined the character of the condition, but it did not insert therein a distinct provision, nor did it undertake to hold that such insertion is permissible.

Clark *vs.* Boorman's Executors (*18 Wall., 493*): In this case the question presented was whether or not on the true construction of a will an estate devised was one in fee or life estate with vested remainder. The court left that question undecided, preferring to decide the case on another point; but incidentally in passing the point the court commented on the perplexity of questions involving construction of wills, and incidentally referred to the general principle of examining the phraseology used in endeavoring to give

effect to the intention of a testator, for example, in case of ambiguous sentences or of sentences which manifestly did not express what the testator intended, etc.; but there is nothing in the opinion in that case justifying the attempt "*by mere construction to incorporate distinct provisions into a will.*"

Colton *vs.* Colton (*127 U. S., 300*): In this case testator devised his entire estate to his wife, and added thereto a recommendation that she make such provision for the mother and sister of testator as in her judgment will be best. The widow did not make such provision, and a bill was filed on behalf of the mother and sister, praying that a trust be declared under said phraseology of the will. The court held that the language employed by testator indicated an intention to make such permanent provision, and accordingly decreed the trust.

Lee *vs.* Simpson (*134 U. S., 572*): In this case a daughter of testatrix had been bequeathed certain property and estate, with power to dispose thereof by last will and testament as she pleased. Thereafter the daughter died, leaving a last will and testament, in which she made various bequests of property, she having an estate of her own in addition to that acquired by her under the bequest aforesaid; and thereupon the question arose whether or not, in her will, testatrix had executed the power to bequeath or whether her will was intended by her to operate only upon her own individual property. The court found that it was evidently the intention of testatrix to dispose not only of her individual estate, but also the property which she had a right to bequeath under the bequest aforesaid, and the court gave effect to the will accordingly.

Robison *vs.* Orphan Asylum (*123 U. S., 702*): In this case testator provided that his widow should have the income of all his estate, with the right to spend it, but not to have it accumulate for her heirs; that his two sisters, if living at the time of the death of himself and his wife, or the one that might then be living, should "have the income of all my estate as long as they may live, and at their death to be divided in three parts," the same to go to three certain named charitable institutions. The two sisters predeceased the testator. It was held that the widow took only a life estate, with the ultimate remainder to the charitable institutions. But that decision is not in conflict with the position here asserted, since the language of the will there under consideration clearly provided a life estate only in the widow, and the predecease of the two sisters of testator, so far as affecting the right of the charitable institutions to take, was immaterial, because, as stated by the court—

"If property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift-over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift. And this applies also whether the gift-over of the legacy or share is to take effect on the death of the prior legatee generally, or on the death under particular circumstances, and whether the legacy be immediate or in remainder."

Metcalf *vs.* Framingham Parish (*128 Mass., 370, 374*): In this case the court expressly recognized and affirmed what is here insisted upon, namely, that "an omission to express his intention cannot be supplied by conjecture."

In none of these cases, however, did the court sanction the changing of a will, by construction, by incorporating therein a distinct provision and condition.

From the authorities now referred to it would seem to be established to a demonstration that the claim of the Home herein cannot be sustained.

In connection with all of the foregoing, it must be borne in mind that it is a maxim firmly imbedded in the common law that an heir can only be disinherited by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed (*1 Jarman on Wills, 765; Rupp vs. Eberly, supra*).

The attention of the court is now asked to a consideration of the conflicting claims interposed herein on behalf of the next of kin of the mother, on the one hand, and of the next of kin of the son, on the other.

IV.

WHERE TWO OR MORE PERSONS PERISH IN A COMMON DISASTER, AND THE ORDER OF THEIR DEATHS IS UNASCERTAINABLE BY EVIDENCE, THERE IS NO LEGAL PRESUMPTION OF SURVIVORSHIP IN FAVOR OF ANY SUCH PERSONS, AND IN SUCH CASE PROPERTY RIGHTS ARE DISPOSED OF AS IF DEATH HAD OCCURRED TO ALL AT THE SAME TIME.

In the first decision below, the learned justice held, after a most careful examination and consideration of probably all the leading reported cases that have arisen in this and other countries in which this question has arisen, that there is no legal or artificial presumption of survivorship in which a court can indulge by which to determine the survivorship between two or more persons who are lost in a common disaster, and that if there is no proof to establish such survivor-

ship, the true rule is that property belonging to either of such persons must be disposed of, either by the laws of descent or distribution, or by will, as though such persons had died at the same time (*Rec., pp. 27, 28*).

On appeal the court of appeals conceded that under the law the court is not permitted in such a case as the present to indulge in any presumption of survivorship; but it declined to follow the uniform line of authorities, holding that in such case the property rights of each such person must be disposed of to the living representatives of each respectively, in effect as if death had occurred to each at the same time (*R., p. 37*), and accordingly held that upon the death of the testatrix it is incumbent upon those claiming as her next of kin "to show the extinction of the intervening pref-"erential right of the son's representatives" (*R., p. 41*).

The opinion concludes that, under the facts and law, there is raised "a *prima facie* right in the personal representatives "of the son, and imposes the burden upon her next of kin of "displacing them by proof of his mother's survival. Proof "of that fact having failed, it follows that the representa-"tives and next of kin of the son are entitled to the entire "fund" (*R., pp. 42, 43*).

The first reported case that seems to have arisen involving this question is that of The King *vs.* Hay (*1 Wm. Blacks., 640*), in the reign of George III. When that case arose the lawyers in England were exercised concerning a state of facts new to English jurisprudence and demanding the application of principles before uninvoked. There General Standwix, his second wife, and a daughter by a former wife all perished at sea in the same calamity, and application for administration on the estate of General Standwix was made

by the maternal uncle and next of kin of the daughter, on the theory of presumption of survivorship; and a similar application was also made by the nephew and the next of kin of the General. The case was afterwards compromised, in respect of the distribution of the estate, upon the recommendation of Lord Mansfield, who said "there was no legal principle upon which he could decide it;" and it is frequently referred to as Lord Mansfield's "undecided case."

The same question arose in 1793, in the prerogative court, in Wright *vs.* Sarmuda, where husband, wife, and children all perished together in a vessel at sea, and Sir William Wynne, in a long and learned discussion, held that the presumption of survivorship could not be indulged in, and that none could transmit rights to another based upon such presumption.

In Taylor *vs.* Diplock, decided in 1815 (*2 Phill., 261*), a like case, Sir John Nichol followed the same rule. *See* also the case of Murray (*1 Curteis, 596*) and Sattherthwaite *vs.* Powel (*id., 705*).

There were two, possibly three, cases in which the English courts seemed to indulge in a presumption of survivorship or of codemise. *See* Sillick *vs.* Booth (*Younge & Collyer Ch. Rep., 121*) and *In re* Selwyn (*3 Hagg. Eccl. Rep., 748*). But the question was finally and definitely settled in Underwood *vs.* Wing (*19 Beav., 459*), which is now universally accepted, both in England and in this country, as correctly expounding the common-law doctrine. In that case it was held that, in the absence of evidence, it could not be assumed that either of two persons lost in a common disaster was the survivor. The case was appealed, and again exhaustively discussed, but with the same result (*4 De G.,*

M. & G., 633). The case then went to the House of Lords, with a like result, the decisions below being approved (*8 H. L., 183*).

Since that case the law has been definitely settled in England on the basis of that decision.

The court there held what is thus correctly stated in the syllabus:

"1. There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause.

"2. Nor is there any presumption of law that all died at the same time.

"3. The question is one of fact, depending wholly on evidence; and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The *onus probandi* is upon the person asserting the affirmative."

In Greenleaf on Evidence (*vol. I, sections 29 and 30*) the author states what has been above shown, namely, that under the common law there is no presumption of survivorship in such case. The author refers to the Roman and French law (Code Napoleon), which indulged in presumptions of age, sex, etc., and also to the Mahometan law of India, where it was presumed, in the case of relatives perishing together, that they all died at the same time, and the property of each passed to his living heirs without any portion of it vesting in his companions in misfortune (*Baily's Mahometan Law of Inheritance, 172*). Such was also the rule of the Danish law. The law authorizing such presumptions to be indulged in has been incorporated in the codes of California (*73 Cal., 649*) and of Louisiana. *See* also Taylor on Evidence (*sections 202 and 203*), Best on Evidence (*pp. 303,*

394), Wharton on Evidence (2d ed.), sec. 1280, and 2 Kent's Commentaries (13th ed.), sec. 435.

One of the leading American cases upon the subject and the one most frequently referred to is that of Coye *vs.* Leach, adm'r (*8 Met., 371*). In that case a father, aged seventy-three years, his married daughter, aged thirty-three years, and her infant all perished at sea in the same calamity. A contest arose as to whether the next of kin of the father, intestate, or the next of kin of the daughter were entitled to the distribution of the father's estate. The court, in its opinion, carefully reviewed the authorities and held that no artificial presumption of survivorship could be indulged in, and that the personal estate of the father passed to his next of kin, and *not* to the next of kin of the daughter.

That case, as will be seen, was precisely similar in its facts to the present, save only that the decedent in that case left no will. The situation of the parties, however, parent and child, was precisely the same as here.

In the case of Russell *vs.* Hallet (*23 Kan., 276*) the court held:

"In the absence of other evidence, the fact as to who was the survivor where several persons perished in the same catastrophe is assumed to be unascertainable, and property rights are disposed of as if death occurred to all at the same time. While, therefore, it is correct to say the law makes no presumption on the subject, the practical consequence is nearly the same as if the law presumed all to have perished at the same moment."

Again, in the case of Ehle's estate (*73 Wis., 445*) it was held:

"In the absence of any such evidence, the question of such survivorship was necessarily to be regarded as unascertain-

able, and the rights of property to be determined as if death occurred to all at the same moment of time."

So, in the case of Johnson *vs.* Merrithew (*80 Me., 111*), the court adhered to the same rule, stating:

"In the absence of evidence from which the contrary may be inferred, all may be considered to have perished at the same moment; not because that fact is presumed, but because from failure to prove the contrary by those asserting it, property rights must necessarily be settled on that theory."

In the case of Newell, ex'r, *et al. vs.* Nichols (*12 Hun., 607; S. C., 75 N. Y. Ct. App., 78*) it was held:

"One who claims through survivorship must prove the survivorship.

"There is no presumption in law of survivorship in case of persons who perish by a common disaster.

"In the absence of other evidence, the fact is assumed to be unascertainable, and the property rights are disposed of as if death occurred at the same time, not because of a presumption of simultaneous death, but because there is no evidence or presumption to the contrary."

In the opinion in that case it is stated (*p. 89*):

"The rule is, that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. In this respect, the common law differs from the civil law."

This same rule was followed by the court of appeals of Maryland in the case of Cowman *et al.*, ex'rs, *vs.* Rogers *et al.* (*33 Md., 403*), the opinion in which contains quite an exhaustive examination of the authorities, and it was there held that in such cases the law indulges in no artificial presumptions of survivorship.

From the foregoing authorities it will be seen that this rule and principle of law has been uniformly adhered to and followed, namely, that where two or more persons perish in a common disaster, and the order of their deaths is unascertainable by proof, the law indulges in no artificial presumptions of survivorship in favor of the one or the other, by reason of age, health, sex, conditions, etc., and that the property and estate of each must be disposed of, either by the laws of descent or distribution, to the living representatives of each such person, not because the fact of codemise is presumed, but because, from the failure to establish survivorship by those asserting it, and upon whom the burden of proof rests, property rights must necessarily be settled on that theory.

Said decision below, in respect of the matter now under consideration, in presuming a *prima facie* right in the next of kin of the son, is not only not supported by authority, but, on the contrary, the uniform rule of decision is exactly the reverse, as is above conclusively shown.

Having thus erroneously *presumed* a *prima facie* right in the next of kin of the son, the said court was led to add the illogical conclusion that the burden of displacing such next of kin rests upon the next of kin of the mother by proof of the *mother's* survival, thus apparently overlooking the fact that proof of the mother's survival would effectually dispose of the next of kin of both mother and son, since in such case the bequest to the Home would take effect.

The only rational and logical solution of the situation is to adhere to the rule now universally followed by the courts, as above shown (in the absence of statutes authorizing and permitting *presumptions*), namely, that the property of each

person so perishing in a common disaster (the relative order of death being unascertainable by *proof*) shall be administered as if death had occurred to all at the same time.

In conclusion, it is respectfully submitted that the decree below is erroneous and should be reversed, so far as it awards the estate of decedent to the next of kin of the son, and that decree should be entered awarding said estate to the next of kin of the mother, namely, these appellants.

A. A. HOEHLING, JR.,
Attorney for said Appellants.

WASHINGTON, D. C.,
October 15, 1902.